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No. 89-1352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Fred Hass,
Petitioner,

v.

OREGON STATE BAR,
Respondent.

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's statement of the questions presented is neither accurate, brief or clear. Two questions are presented:

1. Whether a resolution of the Oregon State Bar Board of Governors establishing a professional liability insurance fund and requiring private practitioners to contribute to the fund is immune from challenge under Section 2 of the Sherman Act, 15 USC § 2 (1982) as state action, or is exempt under Section 1012 of the McCarran-Ferguson Act, 15 USC §§ 1011-1015 (1982); and

2. Whether the resolution affirmatively discriminates against interstate commerce and, if so, whether the burden on interstate commerce is clearly excessive in relation to the local benefits.

LIST OF PARTIES

Petitioner's statement is acceptable. There is only one respondent.

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JURISDICTION OF THE COURT

Petitioner's statement is acceptable.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement is acceptable.

STATUTES INVOLVED

Petitioner's statement is inaccurate. Petitioner does not plead a violation of Section 1 of the Sherman Act, 15 USC § 1 (1982). Petitioner's claim for a violation of the Sherman Act is one for monopoly, or conspiracy to monopolize in violation of Section 2 of the Sherman Act. (R. 1).[1] Also, in his Stipulation, petitioner designates his claim under the Sherman Act as one for monopoly. (R. 5). App. A.

The sole statutes involved are Section 2 of the Sherman Act, 15 USC § 2 (1982), the McCarran-Ferguson Act, 15 USC § 1011-1015 (1982), and ORS 9.080(1) and (2) (1989).

OTHER AUTHORITIES INVOLVED

Petitioner's statement is inaccurate. In addition to the resolution of the Oregon State Bar (R. 13, Exhibit A), other authorities involved in the case include Section 14.300 of the Oregon State Bar Board of Governors' procedures governing the operations of the Fund established.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete in that it omits to disclose the statutory and regulatory scheme at issue, as well as the facts to which petitioner stipulated.

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1 Respondent's references are to the Civil Docket Sheet of the United States District Court for the District of Oregon.

A. The Statutory and Regulatory Scheme.

The resolution challenged by plaintiff was adopted by the Oregon State Bar Board of Governors effective July 1, 1978. A copy of the resolution is attached as Appendix B. The resolution was adopted pursuant to and in accordance with the provisions of the State Bar Act, ORS 9.005 to 9.665. The relevant provisions of that Act establish the following regulatory scheme:

(a) The Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon, ORS 9.080(1);

(b) The Oregon State Bar shall be governed by a Board of Governors which is charged with the executive functions of the state bar, ORS 9.080(1);

(c) The Board of Governors shall have the authority to require all private practitioners to carry professional liability insurance, ORS 9.080(2)(a);

(d) The Board of Governors shall be empowered to do whatever is necessary and convenient to implement its authority to require all private practitioners to carry professional liability insurance, including the authority to own, organize and sponsor any insurance organization and to establish a lawyer's professional liability fund, ORS 9.080(2)(a);

(e) The fund shall pay sums which a private practitioner may become legally obligated to pay as money damages because of a malpractice claim, ORS 9.080(2)(a);

(f) The Board of Governors shall have the authority to assess all private practitioners for contributions to the fund, ORS 9.080(2)(a);

(g) The Board of Governors shall have the authority to establish definitions of coverage to be provided by the fund, ORS 9.080(2)(a); and

(h) The Board of Governors shall have the authority to retain or employ legal counsel to represent the fund and to defend and control the defense of covered claims, ORS 9.080(2)(a).

A copy of ORS 9.080(1) and ORS 9.080(2)(a) is attached as Appendix C.

For purposes of this appeal, the relevant provisions of the resolution are as follows:

(a) The Professional Liability Fund ("Fund") shall be established and shall be perpetual;

(b) The operation of the Fund will be subject to bylaws and a coverage agreement adopted by the Fund's Board of Directors and ratified by the Oregon State Bar Board of Governors;

(c) The Oregon State Bar Board of Governors shall have the authority to assess private practitioners for contributions to the Fund;

(d) The requirement that private practitioners can be assessed for contributions is in the interests of both the citizens of the State of Oregon as well as in the interests of private practitioners;

(e) Professional liability coverage for private practitioners (with the exception of patent attorneys) shall be obtained through the Fund;

(f) The Fund shall be under the control of the Oregon State Bar Board of Governors;

(g) The Fund shall be managed by a Board of Directors appointed by the President of the Oregon State

Bar, subject to ratification of the Oregon State Bar Board of Governors;

(h) The Fund's Board of Directors shall promulgate bylaws subject to the approval of the Board of Governors; and

(i) The Board of Governors shall have authority to vest in the Fund's Board of Directors authority to carry out the provisions of ORS 9.080.

In addition, through adopted policies and procedures, the Board of Governors retains supervisory control over the Fund. Section 14.300 of the Board of Governors' stated procedures requires the Fund to regularly provide the Board with the following:

(a) All financial statements upon their completion;

(b) All proposed changes to bylaws, policies and procedures 30 days before the first scheduled vote for adoption;

(c) All minutes of meetings of the Board of Directors of the Fund or committees of the Board, excepting those parts which are made confidential by ORS 9.080(2)(a);

(d) All reports of investment performance and changes in investments;

(e) All proposed changes in the coverage plan at least 30 days before the first scheduled vote for adoption, with an explanation of the reasons for and effects of the changes;

(g) All closed claim reports prepared in a manner consistent with confidentiality requirements of ORS 9.080(2)(a);

(h) All projections, forecasts, prospective financial statements and the like prepared by or for the Fund;

(i) Any other information as may be requested by the BOG to assist it in discharging its responsibility to the membership of the Bar.

The Board also votes on the adoption of any coverage changes proposed by the Fund. The Board of Governors also has the authority to reject any proposed assessments for coverage presented by the Fund.

In addition, the statutory scheme establishes that the Oregon State Bar is a public body, acting on behalf of the state and exposed to public scrutiny:

(a) The records of the Oregon State Bar are open for public inspection. ORS 9.010(1); 192.410-.505;

(b) The Oregon State Bar's accounts and financial affairs are subject to periodic audits by the State Auditor. ORS 9.010(1); 297.210-.230;

(c) The Oregon State Bar Board of Governors is required to give public notice of its meetings which are open to the public. ORS 9.010(1); 192.610-.690; and

(d) Members of the Oregon State Bar Board of Governors are public officials bound to comply with a Code of Ethics applicable to all public officials. ORS 9.010(1); 244.010-.040.

B. Petitioner's Stipulation.

Petitioner stipulated on April 6, 1987, that he was practicing law in the state of Oregon, that he contributed to the Fund all assessments, and was a member in good standing:

> "The plaintiff was admitted to practice law in the state of Oregon in 1981, is presently practicing in the city of Portland, Oregon, and has heretofore contributed to the Professional Liability Fund all assessments made by the defendant. Plaintiff is presently a member in good standing of the Oregon State Bar." (R. 5) App. A, ¶ 4.

Petitioner fails to advise this Court that he requested an exemption from coverage for the years 1988 and 1989, was exempt from coverage during those years, and continues to be exempt to this day.

Furthermore, petitioner fails to advise this Court that he submitted on January 20, 1989, a request before the Oregon State Bar Board of Governors for enrollment as an inactive member, and that petitioner is no longer entitled to practice law in the state of Oregon until such time as he is reinstated upon a proper application.

In addition, petitioner fails to inform the Court that he has stipulated that the Oregon State Bar actively supervises the administration and the operation of the challenged Fund:

> "The administration and operation of the Professional Liability Fund is actively supervised by the defendant. Direction and supervision of the Professional Liability Fund is provided by a Board of Directors appointed by defendant, and directed by the defendant." (R. 5). App. A, ¶ 14.

BASIS FOR JURISDICTION IN THE U. S. DISTRICT COURT

Petitioner's statement of the basis for jurisdiction in the U.S. District Court is inaccurate. The District Court had subject matter jurisdiction of the action under 28 USC § 1331.

REASONS WHY THE WRIT SHOULD BE DENIED

A. Petitioner's Claims Are Moot.

Certiorari should be denied because petitioner's suit for declaratory and injunctive relief has become moot. This controversy has become academic by reason of changed circumstances since the entry of judgment by the District Court in 1987.

On February 25, 1987, petitioner filed the present action and, at the time of filing, was entitled to practice law in the state of Oregon. This is no longer true today. On January 20, 1989, after the matter had been submitted to decision to the U.S. Court of Appeals for the Ninth Circuit, petitioner requested enrollment as an inactive member. Petitioner is no longer entitled to practice law in the state of Oregon until such time as he is reinstated to the practice.

Furthermore, since 1987, petitioner has been and continues to be exempt from coverage by the challenged Fund.

These changed circumstances throw into serious doubt the prospective benefit of the remedy sought. The questions raised are no longer live. "Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 484 US ____, 108 S Ct 592, 601, 98 L Ed 2d 686, 703 (1988). Indeed, these changed circumstances cast serious doubt on whether there is jurisdiction under Article III of the Constitution to hear this case. "It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals." *Deakins v. Monaghan*, 484 US ____, 108 S Ct ____, 98 L Ed 2d 529, 538 (1988). Whatever injury petitioner at one time claimed, he can no longer claim today. This is true of both of petitioner's equitable claims.

B. The Oregon State Bar Board of Governors' Resolution Is Immune From Challenge Under State Action Doctrine.

Both the Ninth Circuit majority and the dissent agreed that the statutory scheme satisfies the requirement of a clearly articulated and affirmatively expressed state policy:

> "This statutory scheme clearly evinces a legislative policy to supplant free market competition with regulation in the field of primary legal malpractice coverage, and to leave the effectuation of that policy to the Bar." Appendix to Petition for Certiorari, at 9a.

Circuit Judge Ferguson in his dissenting opinion also found the clear articulation requirement satisfied:

> "The Bar's creation and operation of the Professional Liability Fund (Fund) meets the 'clear articulation' requirement. Analysis of the legislative history of Or. Rev. Stat. (ORS) Section 9.080 shows that the Oregon state legislature clearly sanctioned the creation of a mandatory malpractice liability fund when it delegated rulemaking authority to the Bar." Appendix to Petition for Certiorari, at 21a (Ferguson, Circuit Judge, dissenting), citations to legislative history omitted.

Petitioner asserts an apparent conflict of decisions citing *Community Communications Co. v. City of Boulder*, 455 US 40, 102 S Ct 835, 70 L Ed 2d 810 (1982). Specifically, petitioner contends the reasoning and result reached below is inconsistent with this Court's decision in *Boulder*, *supra*. In *Boulder*, a state constitutional provision which granted cities the right of self-government in local and municipal matters did not articulate a policy of replacing competition in the cable television market. It taxes credulity to suggest that the specific authority set forth in ORS 9.080 for the establishment of a fund is comparably vague. There is simply no conflict of decisions. This is particularly so since the application of the clear articulation test will turn on the facts unique to each case.

In addition, petitioner's quotation of three sentences, out of context, from the legislative history of ORS 9.080 misleads the Court. Even as the dissent makes clear in its citations to the Senate Hearings, an analysis of the legislative history shows that the anticompetitive impact of such a fund was clearly sanctioned by the state. Appendix to Petition for Certiorari, at 21a.

The majority also determined that it need not reach the question of whether the challenged resolution meets the requirement of active supervision. It made this determination on the ground that the Oregon State Bar, as a state agency, is not involved in a private arrangement, is exposed to public scrutiny, and acts in the public's interest.

Indeed, the Ninth Circuit majority had no need to reach the question of supervision since petitioner has conceded this question in his stipulation. App. A, ¶ 14. There are two plain facts which remove any doubt that the challenged Fund is subject to supervision and public scrutiny. The first is petitioner's own stipulation and the second is a strict statutory scheme which expressly makes the Bar an instrumentality of the state and subject to public scrutiny. *See* Statement of the Case, *supra*. This conclusion is consistent with *Patrick*.

In *Patrick v. Burget*, 486 US ____, 108 S Ct 1658, 100 L Ed 2d 83 (1988), the United States Supreme Court considered only the "active supervision" element of the state action immunity test:

> "In this case, we need not consider the 'clear articulation' prong of the Midcal test, because the 'active supervision' requirement is not satisfied." 100 L Ed 2d at 92.

The only impact *Patrick v. Burget* can have on the instant matter is with respect to the "active supervision" requirement. In light of paragraph 14 of petitioner's Stipulation (R. 5) (App. A), the only question presented is whether or not the active supervision by the Oregon State

Bar qualifies as active supervision by the state. There is no doubt that this is true. The Oregon State Bar is an instrumentality of the State of Oregon. Pursuant to ORS 9.080(1), the Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. It acts as the state's agent and enjoys an unbroken chain of authority linked directly to the state's sovereign power. *Hoover v. Ronwin*, 466 US 558, 570, 104 S Ct 1989, 80 L Ed 2d 590 (1984).

Furthermore, the facts in this case are quite different than those presented in *Patrick*, *supra*. In *Patrick*, the challenged restraint was the decision by a hospital peer-review committee to terminate a doctor's hospital privileges. The Court held that none of the respondents actually reviewed or could review that decision:

> "Neither the [Ninth Circuit] Court of Appeals nor respondents, however, have succeeded in showing that any of these actors reviews — or even could review — private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses."

Id., 108 S Ct at 1663. The Oregon Health Division's statutory authority only related to a hospital's procedures, and not to the privilege determination. The Board of Medical Examiners did not have the power to disapprove private privilege decisions, but could only determine whether additional action, such as revocation of a physician's license, was warranted. Nor did the opportunity of judicial review of privilege-termination decisions provide the active supervision required.

To the contrary in this case, the Oregon State Bar does have direct supervisory control over the Professional Liability Fund. The Oregon State Bar is governed by an elected Board of Governors which is charged with its executive functions. ORS 9.080(1). The Board has the authority to require all private practitioners to carry professional liability

insurance and to do "whatever is necessary and convenient" to implement that authority, including the authority to own, organize and sponsor any insurance organization and to establish a lawyer's professional liability fund. ORS 9.080(2)(a).

The Board also has the authority to assess contributions and to establish definitions of coverage for the Fund. ORS 9.080(2)(a). The Board adopted a resolution establishing the Professional Liability Fund in accordance with its statutory authority which is under the control of the Board and managed by a Board of Directors appointed by the President of the Oregon State Bar. Section 14.300 of the Board's stated procedures requires the Fund to regularly provide the Board with extensive information, including financial statements, proposed changes in the coverage plan, projections and the like to assist the Board in discharging its responsibility to the membership of the Bar. The Board votes on the adoptions of any coverage changes proposed by the Fund and has the authority to reject any proposed assessments for coverage. Thus, the Oregon State Bar exercises ultimate control over the Fund. Regardless of the petitioner's Stipulation, the facts here are not at all comparable to the facts considered by the Supreme Court in *Patrick*.

This case is more similar to the situation presented in *Washington State Electrical Contractors' Association v. Forrest*, 839 F2d 547 (9th Cir) *vacated*, 109 S Ct 38 (1988), *affirmed on remand* (February 2, 1990). In that case, the Washington State Apprenticeship and Training Council was created by statute and monitored by a state official, the supervisor of apprenticeship within the state department of labor and industries. Similarly in this case, the Fund is supervised and monitored by the Oregon State Bar.

The major difference in *Forrest* is that the challenged anticompetitive conduct of fixing nonunion apprentice wage rates is carried out by the employers and unions who negotiate construction wage rates. The Council simply passed an administrative regulation requiring plaintiffs to

pay apprentices the same wages as union contractors and then enforced that regulation against plaintiffs. The Ninth Circuit held that the active supervision requirement was met. If anything, this case presents more active supervision by the state than is present in *Forrest* given the establishment by the Fund of annual assessments and coverage terms. These assessments and terms are then reviewed and approved by the Board of Bar Governors.

Although the Supreme Court vacated the Ninth Circuit opinion in *Forrest*, it remanded "for further consideration in light of *Patrick v. Burget*." This Court notably did not reverse *Forrest*. The Ninth Circuit decided *Forrest* partially by citing its prior decision in *Patrick* before this Court issued its opinion reversing *Patrick*. On remand, and in the light of *Patrick*, the District Court dismissed the action with prejudice finding all defendants exempt from antitrust scrutiny. The District Court concluded that the Council is a public body and that adequate safeguards exist to ensure that the Council and its members are not pursuing interests other than those of the state. *Forrest*, *supra* (Court's Opinion, Findings of Fact, Conclusions of Law, and Order of Dismissal, February 2, 1990).

Petitioner's contention that there is no link between the Oregon Legislature and the Bar is patently false on its face. The decision below turns on its own facts and on a statutory and regulatory scheme whose meaning is plain on its face. Petitioner urges an improvident grant of certiorari.

C. The Oregon State Bar Board of Governors' Resolution Is Exempt From Challenge Under the McCarran-Ferguson Act.

Petitioner fails to advise this Court that even were state action immunity not available to respondent, the challenged Fund is exempt under the McCarran-Ferguson Act. 15 USC §§ 1011-1015 (1982). This exemption is an additional, independent and sufficient basis for the denial of certiorari.

The McCarran-Ferguson Act, 15 USC § 1011-1015 (the "Act"), provides an exemption from the antitrust laws for the business of insurance, though only to the extent it is regulated by state law, and does not involve a boycott, coercion or intimidation. *E.g. St. Paul Fire & Marine Insurance Co. v. Barry*, 438 US 531, 539-40, 98 S Ct 2923, 2929, 57 L Ed 2d 932 (1978).

Petitioner has failed to plead in his Complaint (R. 1) the existence of any agreement constituting a boycott, coercion or intimidation, and the parties have not stipulated to the existence of such conduct. App. D. As a consequence, petitioner cannot (and indeed has not attempted to) be heard to say that respondent enjoys no protection under the McCarran-Ferguson Act.

Conversely, respondent can affirmatively show the threshold elements needed to obtain McCarran-Ferguson protection.

In pertinent part, the Act provides:

> "§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.
>
> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance ..., unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the ... Sherman Act, ... the Clayton Act, ... and the Federal Trade Commission Act, ... shall be applicable to the

> business of insurance to the extent that such business is not regulated by State law." (Emphasis in original).

Accordingly, to be entitled to the exemption of the Act, the challenged practice must: (1) constitute the business of insurance; and (2) be regulated by state law.

1. The Professional Liability Fund Is Engaged In The "Business of Insurance."

Two United States Supreme Court decisions, *Union Labor Life Insurance Company v. Pireno*, 458 US 119, 129, 102 S Ct 3002, 73 L Ed 2d 647 (1982), and *Group Life and Health Insurance Company v. Royal Drug Company*, 440 US 205, 99 S Ct 1067, 59 L Ed 2d 261 (1979), have set forth three factors a court must consider in determining whether a practice constitutes the "business of insurance": (1) whether the practice has the effect of transferring or spreading the policyholder's risk; (2) whether the practice is an integral part of the contractual relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry. *United States v. Title Insurance Rating Bureau of Arizona*, 700 F2d 1247, 1251-52 (9th Cir 1983).

It is indisputable that the Oregon State Bar, by means of the resolution, sought to distribute the risk of malpractice across all members of the Bar in private practice. The effect of the resolution is precisely what the Supreme Court described when it formulated the risk spreading criterion in *Pireno, supra*, and in *Royal Drug, supra*. In a similar case to that filed by plaintiff, physicians practicing in Los Angeles County challenged a practice of the Los Angeles County Medical Association ("LACMA") whereby the association and its approved insurance agent (Nettleship Co. of Los Angeles) agreed to insure only members of the LACMA. *Feinstein v. Nettleship Co. of Los Angeles*, 714 F2d 928, 931-32 (9th Cir 1983).

In *Feinstein, supra*, the Ninth Circuit affirmed the district court's order granting the defendants' motion for summary judgment. The Court of Appeals found that the LACMA and Nettleship agreement was within the scope of the McCarran-Ferguson Act, and approved the association's intent to assure coverage for certain high-risk specialties and to distribute that risk across the membership:

> "That practice is ... demonstrably related to the allocation and spreading of risk, for, as the district court pointed out, it defines a pool of insureds over which risk is spread. The medical association sought to provide a single insurance broker for all of its members in order to assure coverage for certain high-risk specialties, thereby distributing risk across the membership. The effect is to spread risk across a wide area, and that is precisely what the Supreme Court described when it formulated the risk spreading criterion." 714 F2d at 932.

The Board of Governors' requirement that all active private practitioners obtain coverage through the Fund also demonstrates the sort of "positive relationship" to the goal of risk spreading. *See Metropolitan Life Insurance Company v. Massachusetts*, 471 US 724, 105 S Ct 2380, 85 L Ed 2d 728 (1985); *SEC v. National Securities, Inc.*, 393 US 453, 89 S Ct 564, 21 L Ed 2d 668 (1969); *State of Maryland v. Blue Cross and Blue Shield Association*, 620 F Supp 907 (DC Md 1985).

With respect to the second criterion, the resolution's requirement that all private practitioners shall be assessed contributions for the Fund is undoubtedly an integral part of the contractual relationship between the Fund and its insureds.

The third *Pireno* factor, whether the practice is limited to entities within the insurance industry, is also met here. Where the risk-spreading factor is present as in this case, the business of insurance is not limited to traditionally recognized areas of insurance. *Feinstein v. Nettleship Co. of*

Los Angeles, supra, 714 F2d at 931. The fact that the Fund is not an insurance company as such has no bearing on whether it qualifies as an "entity within the insurance industry".

The Ninth Circuit, among other courts, has ruled that the appropriate focus of the third factor is the nature of the activity itself. *United States v. Title Insurance Rating Bureau of Ariz., supra*, 700 F2d at 1252, citing *Perry v. Fidelity Union Life Insurance Co.*, 606 F2d 468, 470 (5th Cir 1979), *cert. denied*, 446 US 987 (1980); *Lowe v. Aarco-American, Inc.*, 536 F2d 1160, 1162 (7th Cir 1976) ("There is nothing in the McCarran Act which limits the 'business of insurance' to the business of insurance companies"); *Manasen v. California Dental Services*, 424 F Supp 657, 666 (ND Cal 1976) (the protection afforded by the McCarran Act is not limited to insurance companies, but rather to conduct which qualifies as the business of insurance).

The requirement that all private practitioners contribute to the Fund to assure coverage for the risk of legal malpractice necessarily qualifies as the business of insurance.

2. The Professional Liability Fund Is Regulated By State Law.

To be exempt under the McCarran-Ferguson Act, the requirement challenged here must not only qualify as the business of insurance, but it must also be regulated by state law. *E.g. Union Labor Life Insurance Company v. Pireno, supra*, 458 US at 129.

The McCarran-Ferguson Act contemplates that a state which regulates the business of insurance has the power to permit a practice which would otherwise violate the antitrust laws:

> "State power to regulate necessarily includes the discretion to prohibit, permit, or limit

> insurance practices as the state sees fit. The McCarran-Ferguson Act clearly contemplates that where a state undertakes to regulate the business of insurance, it has the power to permit practices which would otherwise violate federal antitrust laws..." *Dexter v. Equitable Life Assurance Society of U.S.*, 527 F2d 233, 236 (2d Cir 1975).

Furthermore, it was Congress' intent to leave to the judgment of each state the method and specifics of whatever regulation a state may permit to be established, regardless of whether it is "an ideal manner in which to regulate" insurance:

> "We are confident that Congress in enacting the McCarran Act did not intend to impose a uniform standard of regulation upon all of the states. It is our view that the congressional intent was to leave to the judgment of each state the specifics of regulation which it should see fit to adopt." *Ohio AFL-CIO v. Insurance Rating Board*, 451 F2d 1178, 1183 (6th Cir 1971), *cert. denied*, 409 US 917 (1972).

Lastly, it is not necessary for the state statute to approve a particular insurance practice — the state need only permit or authorize the practice:

> "If a state has generally authorized or permitted certain standards of conduct, it is regulating the business of insurance under the McCarran Act." *California League of Independent Insurance Producers v. Aetna Casualty Surety Company*, 175 F Supp 857 (ND Cal 1959).

This view of regulation was reiterated by the Ninth Circuit in *Feinstein v. Nettleship Company of Los Angeles*, *supra*, 714 F2d at 928. There, the Court of Appeals indicated that it is not necessary for a state statute to approve a

particular practice. Rather, it is sufficient if the state contemplates a scheme of regulation over the challenged parties. *See also Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F2d 1276 (9th Cir 1983)(states need not expressly authorize a specific activity, or proscribe it, for the exemption to apply; it is enough that an overall scheme of regulation exists).

ORS 9.080(2)(a) clearly permits the establishment of the Fund, and just as clearly satisfies the "regulated by state law" requirement.

Under ORS 9.080(2)(a), the Fund is exempt from the requirements of the Oregon Insurance Code. However, courts have held that "state regulation" of the business of insurance need not occur by means of the State Insurance Code. For example, in *State of Maryland v. Blue Cross and Blue Shield Association*, *supra*, 620 F Supp 907, the plaintiffs argued that since defendants' practices were not regulated by the Maryland Insurance Code, those practices were not entitled to the protection of the McCarranFerguson Act. The court disagreed, stating that:

> "In enacting the McCarran-Ferguson Act, Congress was not concerned with the particular label a state assigned to its laws but with whether a state would remain free to regulate insurance companies as it saw fit. In this instance, the Maryland legislature has seen fit to regulate certain practices in the context of its insurance laws and others in the context of its antitrust laws. The label given to a particular regulatory provision should not be controlling."

The dissenting opinion below labors under the misimpression that "state regulation" of the business of insurance must be by means of the Oregon Insurance Code.

The dissenting opinion also urges the inapplicability of the McCarran-Ferguson Act based on a disagreement

with the precedent. Unless this Court is prepared to grant certiorari to effectively re-write the provisions of the Act and to overrule its jurisprudence, certiorari should not be granted.

Lastly, petitioner's failure to allege the existence of a boycott, coercion or intimidation removes from consideration whether such conduct would disqualify respondent under the Act. App. D. Petitioner's omission escaped the dissenter's notice.

D. The Oregon State Bar Board of Governors' Resolution Does Not Affirmatively Discriminate Against Interstate Commerce, Or Its Impact Is Not Clearly Excessive.

Petitioner's urges the grant of certiorari on his Commerce Clause claim based on the following opinion unanimously held by the court below:

> "The resolution does not affirmatively discriminate against interstate insurance transactions on its face; nor does it have such an effect. In-state and out-of-state insurance companies are burdened in exactly the same way - *all are effectively prevented from competing with the Bar to provide primary malpractice coverage.*" Petition for Certiorari, Appendix at 16a (emphasis added).

Petitioner's criticism of the lower court's unanimous decision is based on the assumption that the Fund should be treated as a private in-state insurance company. Petition for Certiorari, at 16. Certainly, if the challenged resolution is immune under the state action doctrine, it cannot also be deemed a private in-state insurance company. Indeed, even were the Fund not immune under the state action doctrine, petitioner offers no explanation or authority for his novel view that the Fund should be deemed a private, incorporated entity. The remainder of petitioner's

contentions are built upon this foundation and merit little analysis.

As the court below observed without dissent, petitioner has not (and cannot) demonstrate that the mandatory participation provision burdens interstate commerce. Petition for Certiorari, Appendix, at 17a.

Neither in his argument addressing whether any putative burden on interstate commerce is clearly excessive, nor in his expressed suspicions about the widespread effect of the Fund does petitioner offer any compelling reason to reject the lower court's findings regarding the public benefit. Petition for Certiorari, Appendix, at 17a-18a. The court below stated the better view, a view better informed by the realities affecting both the practitioner and the consumer. Furthermore, this determination by the court below turns on a finding of facts which are unique to this case and not appropriate for this Court to redetermine.

CONCLUSION

For each of the foregoing reasons, the Court should deny certiorari.

Respectfully submitted,

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APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRED HASS,	)	
	)	
Plaintiff,	)	Civil No. 87-196-LE
	)	
v.	)	STIPULATION
	)	
OREGON STATE BAR,	)	
	)	
Defendant.	)	

For the purpose of submitting all of the claims asserted in plaintiff's Complaint and the defenses tendered by the defendant's Answer to the court for adjudication, the parties hereby stipulate that for the purpose of this submission, the following facts are true.

1. In this action, plaintiff seeks declaratory and injunctive relief, which plaintiff claims is available under 28 USC §§ 2201, 2281, and 2284.

2. Plaintiff claims this Court has jurisdiction of plaintiff's First Claim for Relief [Interstate Commerce] by virtue of 28 USC §§ 1331, 2201, and 2281.

3. This Court has jurisdiction of plaintiff's Second Claim for Relief [Monopoly] pursuant to 15 USC § 26.

4. The plaintiff was admitted to practice law in the state of Oregon in 1981, is presently practicing in the city of Portland, Oregon, and has heretofore contributed to the Professional Liability Fund all assessments made by the defendant. Plaintiff is presently a member in good standing of the Oregon State Bar.

5. The defendant was and is a public corporation and an instrumentality of the Judicial Department of the state of Oregon. Defendant may sue and be sued.

6. Defendant's office and the office of its Executive Secretary are in the city of Lake Oswego, Clackamas County, Oregon.

7. In 1977, the Legislative Assembly passed an Act, subsequently codified as ORS 9.080, which provides as follows:

> "(2)(a) the board [Board of Bar Governors] shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization

> authorized under the laws of the State of Oregon and to establish a lawyers professional liability fund."

8. In 1977, the Board of Bar Governors passed a resolution providing in part as follows:

> "1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law in Oregon shall carry professional liability coverage with aggregate limits of not less than $100,000.00 ... .
>
> "2. Such professional liability coverage for all active members engaged in the private practice of law in Oregon, except patent atorneys, shall be obtained through the Oregon State Bar Professional Liability Fund ... ."

9. Following said enactment and the adoption of said resolution, the defendant, through its Professional Liability Fund, commenced providing insurance coverage for legal malpractice to active members of the Oregon State Bar engaged in the private practice of law in the State of Oregon. Contemporaneously therewith, said members have been required to carry a minimum amount of coverage. The cost of said coverage is assessed by the Board of Directors of the Professional Liability Fund, approved by defendant, and paid to the Professional Liability Fund.

10. In each year following 1977, attorneys engaged in private practice in the State of Oregon have been required to contribute the amounts assessed, and the Professional Liability Fund has provided insurance for legal malpractice.

11. Plaintiff, together with all attorneys in private practice in Oregon, are required to participate in the Professional Liability Fund Plan. Failure to participate

shall result in suspension from membership in the Bar pursuant to ORS 9.200.

12. Plaintiff has made all contributions necessary to pay Professional Liability Fund assessments for each year plaintiff has been in private practice, and plaintiff is presently making said contributions on a quarterly basis.

13. In 1977, just prior to the time defendant's Professional Liability Fund Plan went into effect, approximately 35% of the attorneys in private practice in the State of Oregon were without any legal malpractice insurance coverage.

14. The administration and operation of the Professional Liability Fund is actively supervised by the defendant. Direction and supervision of the Professional Liability Fund is provided by a Board of Directors appointed by defendant, and directed by the defendant.

15. The Oregon State Bar Professional Liability Fund currently has in effect one minimum legal malpractice insurance plan, a copy of which is attached hereto.

16. If called to testify, plaintiff will testify to the facts set forth in his affidavit.

STIPULATED TO:

BLOOM & SPAULDING

Date: April 6, 1987 By /s/Michael H. Bloom
Michael H. Bloom
Of Attorneys for Plaintiff

Date: April 6, 1987 McEWEN, GISVOLD, RANKIN & STEWART
By /s/Janice M. Stewart
Janice M. Stewart
Of Attorneys for Defendant

APPENDIX B

RESOLUTION

RESOLVED:

WHEREAS, the Board of Governors of the Oregon State Bar is empowered under the provisions of ORS 9.080 as amended by S.B. 190- Chapter ____, Oregon Laws, 1977, to require that each active member of the Oregon State Bar engaged in the private practice of law in Oregon carry professional liability insurance and to establish a lawyer's professional liability fund, such fund to pay on behalf of members of the Oregon State Bar in the private practice of law, all sums which may be provided under such a plan, which any member shall become legally obligated to pay as money damages because of any claim made against such member as the result of any act or omission of any member in rendering or failing to render professional services for others in the member's capacity as an attorney, or caused by any other person for whose acts or omissions the member is legally responsible, subject to the bylaws of the Fund and plan (coverage agreement) to be adopted by the Board of Directors of the Fund and ratified by the Board of Governors, and

WHEREAS, such statute further provides that the Board of Governors shall have the authority to assess all attorneys in the private practice of law for contributions to such fund and that pursuant to ORS 9.181 as amended by S.B. 190, the annual membership fees may include any amount assessed under any plan for legal liability coverage, and

WHEREAS, the Board of Governors of the Oregon State Bar considers it in the interest of the citizens of the State of Oregon and the active members of the Oregon State Bar in the private practice of law to make such requirements and enact and create such fund and cause such assessments to be made as above provided;

NOW, THEREFORE, IT IS RESOLVED:

1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law shall carry professional liability coverage with aggregate limits of not less than $100,000.

2. That such professional liability coverage for all active members in the private practice of law, with the exception of patent attorneys, shall be obtained through the Oregon State Bar Professional Liability Fund. Patent attorneys shall be required to furnish evidence by July 1st of each year that such attorney has in force at least $100,000 of comparable coverage with a private insurance carrier.

3. The Oregon State Bar does hereby establish a fund to be known as the Oregon State Bar Professional Liability Fund and its duration shall be perpetual unless and until such fund shall be dissolved pursuant to the bylaws as established for such fund.

4. The Oregon State Bar Professional Liability Fund (Fund) shall be under the control of the Board of Governors of the Oregon State Bar, but shall be managed by a Board of Directors appointed by the President of the Oregon State Bar, such appointment subject to the ratification of the Board of Governors. The initial Board of Directors shall be so appointed and so ratified by October 1, 1977. The Board of Directors of the Fund shall consist of seven active members of the Oregon State Bar in the private practice of law. The term of such Director shall be for three years on staggered terms, with the term of one member expiring at the conclusion of the annual meeting of the Oregon State Bar in the year 1978; the term of three members expiring at the conclusion of the annual meeting in the year 1979; and the term of three members expiring at the conclusion of the annual meeting in the year 1980.

5. The bylaws of the Fund shall be promulgated by the Board of Directors subject to the approval of the Board of Governors.

6. The Board of Governors shall have authority to vest in the Board of Directors of the Fund such authority as is necessary and convenient in carrying out the provisions of ORS 9.080 relative to the requirement that all active members carry such professional liability coverage, establish the Fund to provide such coverage, and assess active members for participation therein.

7. As a contribution to the Fund, the Board of Governors shall assess all active members of the Bar in the private practice of law as part of their annual dues or otherwise pursuant to law. For the year 1978, the assessment shall be in the sum of $250 to be paid with the annual dues. Any member admitted after September 1, 1977 shall be assessed prorata on the basis of one-half of the normal annual assessment for the first year of admittance. Any member entering the private practice of law but admitted prior to September 1, 1977 shall be assessed prorata on the basis of the normal assessment. Members of the bar in the practice of law for whom annual dues are waived shall be subject to assessments under the provisions of this resolution.

8. All active members of the Oregon State Bar in the private practice of law shall prior to November 1, 1977, return a claims information form.

9. The matter of the assessments for the Fund shall be submitted to the membership of the Bar at the 1977 annual meeting as part of the dues resolution.

10. The board shall have the authority to loan such sums as are necessary and proper as organizational expenses of the Fund to be repaid out of the capital of the Fund.

APPENDIX C

9.080 Duties of board; professional liability fund; quorum; status of employes of bar; fee for registration of professional corporation. (1) The state bar shall be governed by the board of governors, except as provided in ORS 9.130. The board is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice. It shall have the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law.

(2)(a) The board shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible. The board shall have the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to such fund, to establish definitions of coverage to be provided by such fund and to retain or employ legal counsel to represent such fund and defend and control the defense against any covered claim made against such

member. Any fund so established shall not be subject to the Insurance Code of the State of Oregon. Records of a claim against the fund are exempt from disclosure under ORS 192.410 to 192.500.

APPENDIX D

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRED HASS,	)	
	)	
Plaintiff,	)	Civil No. 87-196-LE
	)	
v.	)	COMPLAINT - Claim for
	)	Declaratory and Injunctive
OREGON STATE BAR,	)	Relief (Interstate Commerce,
	)	Anti-trust
Defendant.	)	

For his First Claim for Relief, Plaintiff alleges as follows:

(Interstate Commerce)

1.

That this is a proceeding for declaratory and injunctive relief under Title 28, Sections 2201, 2281, and 2284 of the United States Code. Jurisdiction is conferred on this court by virtue of Title 28, Sections 1331, 2201 and 2281 of the United States Code.

2.

Plaintiff is an attorney in good standing, licensed to practice law in the State of Oregon, with his principal place of business in Portland, Oregon.

3.

That Plaintiff has heretofore paid and offered to pay, as hereinafter alleged, to the Oregon State Bar, all dues and assessments lawfully levied upon him as a member of the Oregon State Bar, and is now in good standing as a member of said Oregon State Bar.

4.

That during all times herein mentioned, the Oregon State Bar was and now is a corporation incorporated by the provisions of Chapter 28 of Oregon Laws of 1935, and thereunder, may sue and be sued, and during all the times herein mentioned, was and now is an instrumentality of the judicial department of the government of the State of Oregon.

5.

That the office of the Oregon State Bar, and the official location of its executive secretary, are at the City of Lake Oswego, County of Clackamas, State of Oregon.

6.

In 1977, the Oregon legislature passed Senate Bill 190, later codified as ORS 9.080, which stated in part:

> [Board of Bar Governors] shall have the authority to require all active members of the state bar engaged in the private practice of law in Oregon to carry professional liability insurance and shall be empowered to do whatever is necessary to implement this provision, including the authority to organize

and sponsor any insurance organization authorized under the laws of the State of Oregon.

7.

That allegedly pursuant to the delegation provisions of ORS 9.080, the Board of Bar Governors passed a resolution in 1977 stating in part:

1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law in Oregon shall carry professional liability coverage with aggregate limits of not less than $100,000.00....

2. Such professional liability coverage for all active members engaged in the private practice of law in Oregon, except patent attorneys, shall be obtained through the Oregon State Bar Professional Liability Fund....

8.

That pursuant to said resolution, the Oregon State Bar, through the Professional Liability Fund, sells primary coverage for legal malpractice insurance to all active members of the Oregon State Bar whose place of business is in the State of Oregon.

9.

That pursuant to said resolution, Plaintiff is required to obtain primary coverage for legal malpractice by the Oregon State Bar.

10.

That the Oregon State Bar has available for purchase only one primary legal malpractice insurance coverage plan.

11.

That pursuant to said resolution, Plaintiff is required to buy said primary legal malpractice coverage plan from the Oregon State Bar.

12.

That the coverage limit of said resolution has been since amended, but the requirement that attorneys obtain primary coverage for legal malpractice insurance from the Professional Liability Fund has not been amended and is currently in force.

13.

That Plaintiff has paid to the Oregon State Bar the full amount of the annual Professional Liability Fund coverage due each and every year Plaintiff has been in practice in the state of Oregon and Plaintiff will continue to pay said amount as it becomes due to said Professional Liability Fund.

14.

That Plaintiff stands ready, able, and willing to pay any and all assessments heretofore levied, or which may hereafter be levied against him for the Professional Liability Fund by said Board of Bar Governors and shall be adjudged in this suit to have been lawfully levied on the Plaintiff.

15.

That except for said resolution, Plaintiff is ready and willing to do business with other insurance carriers, both intrastate and interstate, now and in the future.

16.

That said resolution prevents private insurance carriers, both inside and outside the State of Oregon, from selling said primary coverage to Plaintiff.

17.

That said resolution prevents other attorneys who are licensed to practice law in the State of Oregon and who maintain principal places of business in the State of Oregon, from obtaining primary legal malpractice insurance coverage from private carriers.

18.

That except for said resolution, there are insurance carriers exist, both inside and outside the State of Oregon, which are ready and willing to sell primary legal malpractice insurance coverage to Plaintiff and other Oregon attorneys now and in the future and, but for the restrictions of said resolution, would in fact sell coverage to Plaintiff and other Oregon attorneys.

19.

That said resolution poses an undue burden on, and discriminates against, interstate commerce in violation of the commerce clause of the U.S. Constitution, Article 1, Section 8, Clause 3 in that Plaintiff is prevented from purchasing primary legal malpractice insurance coverage from alternative insurance carriers, and said resolution discriminates against insurance carriers by not allowing them the option of selling primary coverage of legal malpractice insurance to attorneys in the State of Oregon.

20.

That said resolution is discriminatory on its face and serves no legitimate local purpose that competition in the area of selling primary coverage legal malpractice insurance could not fulfill.

21.

That Plaintiff, in view of said discriminatory resolution is, in effect, prohibited from seeking primary legal malpractice insurance coverage from private competitors in the industry. Moreover, because of said resolution, Plaintiff is prohibited from reaping the benefits of competition within the industry.

22.

That also because of said resolution, Plaintiff is prohibited from seeking alternative primary coverage plans more tailored to his private practice.

23.

That Plaintiff has no adequate remedy at law, for the reason that it is impossible with any degree of accuracy to determine the amount of damages that will be incurred by Plaintiff by reason of the threatened deprivation of Plaintiff's right to buy insurance from competitors and competitors being prohibited from selling said insurance to Plaintiff, and for the further reasons given hereinabove.

For his Second Claim for Relief, Plaintiff alleges as follows:

(Anti-Trust)

24.

Plaintiff realleges paragraphs 2 through 18, 22 and 23.

25.

That this court has jurisdiction and this action arises under Section 7 of the Sherman Act, 15 USC Section 7 and Sections 4 and 16 of the Clayton Act, 15 USC Sections 15 and 26, of the activities of Defendants hereinafter recited, enter a cover trouble damages in the costs of suit, including reasonable attorney's fees, for injuries sustained

by Plaintiff by reason of Defendant's violations of Sections 1 and 2; of the Sherman Anti-Trust Act, 15 USC Sections 1 and 2.

26.

That Defendant's resolution has created a monopoly in the area of the sale of primary insurance coverage in the manner described above by creating barriers to entry of competition by private carriers and by prohibiting Plaintiff from seeking primary coverage legal malpractice insurance from private competitors in the industry.

27.

That Defendant's resolution, leading to the activities more specifically described above, violates sections 1 and 2 of the Sherman Act, 15 USC Sections 1 & 2 (1976) which give rise to injunctive relief under Section 16 of the Clayton Act, 15 USC Section 26 (1973), and attorneys fees under Section 4 of the Clayton Act, 15 USC Section 15, 13b (1973).

28.

That as a result of the monopoly on the market for primary coverage of legal insurance for licensed practicing attorneys who maintain principal places of business in Oregon, Plaintiff is compelled to pay anti-competitive prices for said insurance and is unable to reap the benefits of competition by procuring said insurance from private carriers.

29.

Unless restrained, Defendant will continue to monopolize the market and distribution of primary legal malpractice insurance coverage, thereby precluding Plaintiff from seeking competitors in the business and reaping the benefits of competition by procuring said insurance from private carriers.

30.

Plaintiff is entitled under Title 15 USC Section 26 to injunctive relief against the threat of loss of money Plaintiff is incurring through Defendant's continuation of the monopoly or the conspiracy to monopolize the marketing of primary coverage legal malpractice insurance.

31.

That as a result of Defendant's monopoly on the primary legal malpractice insurance coverage Plaintiff is threatened to be damaged because he is prevented from seeking said insurance coverage from potential competing private carriers and Plaintiff is threatened to be damaged by Defendant's prohibition against allowing said private carriers to sell said insurance to Plaintiff allowing for competition and competitive prices.

32.

That the anti-competitive activity monopolizing the primary coverage for legal malpractice insurance is not authorized by state statute in a manner to immunize said activity from the anti-trust laws.

WHEREFORE, Plaintiff prays for relief as follows:

1. For his First Claim for Relief:

A. That the court declare the provision of the Oregon State Bar's resolution requiring practicing Oregon attorneys to buy primary legal malpractice insurance coverage from the Oregon State Bar unconstitutional in violation of the U.S. Constitution, Article 1, Section 8, Clause 3.

B. That the Oregon State Bar be enjoined from preventing Plaintiff from purchasing primary legal malpractice insurance coverage from private carriers.

C. For Plaintiff's costs and disbursements incurred herein.

2. For his Second Claim for Relief:

A. That the court declare the Oregon State Bar's resolution requiring practicing Oregon attorneys to buy primary legal malpractice insurance coverage from the Oregon State Bar be subject to challenge under the federal anti-trust laws.

B. That the Oregon State Bar's activity of preventing Plaintiff from purchasing primary legal malpractice insurance coverage from private carriers has created a monopoly in the area of said insurance in violation of the federal anti-trust laws and should be enjoined.

C. For Plaintiff's costs and disbursements herein.

D. For Plaintiff's reasonable attorney's fees.

RESPECTFULLY SUBMITTED this 24 day of February, 1987.

BLOOM & SPAULDING

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